Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Communications Assistance for	)	**ET Docket No. 04-295**
Law Enforcement Act and	)	
Broadband Access and Services	)	**RM-10865**

COMMENTS OF CORR WIRELESS COMMUNICATIONS, L.L.C.

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SUMMARY

Corr Wireless is a regional CMRS carrier. Like most telecommunications carriers, Corr has a long history of cooperating with law enforcement in carrying out court surveillance orders, but the present proposal raises fundamental issues about who should pay for the CALEA infrastructure. The CALEA scheme contemplates that installation of CALEA-implementing equipment and software will occur through a process of natural system upgrades. In that event, the carrier bears the slight incremental cost involved. If this is not the case and the upgrade is therefore not readily achievable, Law Enforcement must pay for the installation. The Commission to date has not laid out guidelines establishing what would qualify as "not readily achievable," and it has not rationalized the process to permit such determinations to be made before the implementation decision must be made.

Corr submits that there are certain categories of CALEA-driven enhancements to operating systems which qualify generically as "not readily achievable" and therefore should be presumptively exempt from installation unless Law Enforcement agrees to pay for them. Such a generic determination would clarify the status of certain upgrades and eliminate the need for case-by-case reviews. Specifically, Corr submits that upgrades to obsolete TDMA networks which are in the process of being phased out should be deemed not readily achievable. If Law Enforcement for some reason thought it was important to expend resources on equipment which will soon be abandoned, it could do so, but the carrier should not bear that burden.

Secondly, Corr submits that, unlike other FCC-mandated social services like E-911, the benefits of CALEA are not realized by telecommunications subscribers but by society

at large. It is therefore not appropriate to pay for CALEA costs through subscriber based surcharges or assessments. Rather, the general public should fund these services through normal appropriations just as it funds all other crime-fighting expenses.

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Introduction

Corr Wireless Communications, L.L.C. ("Corr"), by its attorneys, hereby submits these comments on the Commission's proposal to expand and clarify the application of CALEA requirements to telecommunications carriers.

Corr is a relatively small CMRS carrier in northern Alabama and adjacent states. Both Corr and its predecessor wireline telco have a long history of cooperating with law enforcement as much as possible, taking into account the privacy rights of their customers. Corr has found in its more than 50 years of experience in the field of telephony that most carriers conduct themselves in the same way. They devote a considerable amount of staff time and resources to cooperating with law enforcement on a voluntary basis to apprehend criminals and otherwise serve the ends of justice. This pattern has held true in the area of VoIP as the industry has bent over backwards to try to accommodate the needs of law enforcement within the parameters of existing technology and the rights of subscribers. In evaluating what steps to take next, the Commission must understand that the telecommunications industry, almost without exception, is quite willing to aid law enforcement to the extent practicable. No one is deliberately trying to thwart law enforcement or devise ways of evading wiretaps; rather, the technology of phone call delivery for reasons wholly independent of crime prevention or detection has simply evolved beyond law enforcement's ability to easily access it.

These comments will primarily address the issue of who should bear the financial burden of purchasing and installing intercept equipment which would otherwise not be necessary for normal telecommunications operations. We assume that others will debate more fully the question of whether providers of "information services" were intended by

Congress to be covered by CALEA obligations. We cannot help but observe, however, that the term "information services" had in 1994 already come to refer to internet service as opposed to common carriage, a usage which Congress carried forward in the 1996 revisions to the Communications Act. Recent pronouncements of many congressmen have expressed surprise that the FCC is now taking a relatively well-settled term of art and shrinking its application severely so that the very internet service providers, ISPs, who were intended to be embraced by the term "information services" in 1996 are now tentatively deemed in the present NPRM to be excluded from that category. This is counterintuitive indeed. When the Commission must stretch to find that the exact same words mean two different things when used by Congress two years later, that should be a common sense warning that the stretch has gone too far.

I. Application of 107(c) and 109(b) Where the Technology is Being Phased Out.

Corr operates a cellular/PCS system in northern Alabama. Like many small carriers – and a couple of the larger ones – Corr found itself in the early part of this decade with an embedded TDMA network. TDMA is a network design that has fallen into disfavor to the point where no new handsets are being manufactured to that standard, switching equipment is not being updated, handset-based E911 technologies are impossible to implement, and no new systems are being installed with this technology anywhere. The technology is being gradually phased out in favor of CDMA or GSM systems virtually everywhere. To be curt, it is rapidly on the way to obsolescence.

Corr recognized this trend and began a network overlay several years ago to gradually replace its embedded TDMA system with a state-of-the-art GSM system. The transition strategy necessarily involves operating both the TDMA system and the new

GSM system simultaneously for a period of years as the TDMA customer base replaces its handsets and switches over to the newer system. In a few years, the TDMA system can be abandoned altogether.[1] During this planned phase-out of the TDMA system, there will be no "improvements" to the system because manufacturers are no longer making or distributing upgrades to TDMA systems. Nor would it make sense to invest capital in upgrading a system which is planned to be disposed of in the near future. Corr will maintain service to those customers who still use TDMA, but it will not expand it, add features, or otherwise upgrade it.

This circumstance is not an uncommon one in rural markets where TDMA systems were installed in the late '80's or early '90's and have worked fine for the last decade. The transition from TDMA to GSM has been a costly undertaking, not only because of the substantial investment in the new equipment itself, but also because of the need to maintain operations over the legacy network at the same time. Into this mix we must throw the CALEA requirements.

Corr has arranged its GSM network to accommodate CALEA by use of a "trusted third party" (Verisign) approach. Even this approach entailed not insubstantial costs to outfit the switch and obtain the necessary licensing rights, costs which were in no way part of the evolutionary development of the Corr system. Nevertheless, Corr made those expenditures and is fully CALEA-capable on its GSM system. Thus, for that system, no extension of the CALEA deadlines was necessary. However, for its underlying TDMA system, Corr participated in the Flexible Deployment Program, requesting (i) a

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[1] It may be noted that the FCC's rules require cellular carriers to provide service to analog customers through Feb. 18, 2008, so Corr and all other carriers will have to maintain analog capacity for the few remaining legacy analog customers through that date.

determination from the FBI that implementation of CALEA capability on its TDMA system was not necessary for two years (the maximum permitted by the statute) and (ii) a determination from the FCC that an extension be granted. Neither request has yet been acted upon.

Two guiding principles come into play here. First, as the Commission recognized in the NPRM at paragraph 96, determinations of what is "reasonably achievable" under the Act should include "consideration for the evolutionary introduction of new technology by telecommunications carriers in the normal course of business." Second, the entire statutory scheme contemplates that the federal government will either pay for post-1994 CALEA-necessitated capabilities or release the carrier from the obligation unless the compliance is "reasonably achievable," ***i.e.,*** **unless the compliance would not impose significant difficulty or expense on the carrier. Section 109(b). The intent of the statute was plainly that** ***burdensome*** **expenses entailed by CALEA should not be borne by the carriers themselves but rather were to be borne by the federal government if it decided that it in fact needed the capabilities. This is entirely appropriate: there would be no precedent for imposing on a particular class of American business the obligation to finance and construct anti-crime operations without compensation. Congress could no more impose such a burden on telecommunications carriers than it could order gun manufacturers to make guns for the army and turn them over or order Ford to make police cars and deliver them to the FBI for use in fighting crime. Nevertheless, Law Enforcement has consistently tried to stand this statutory scheme on its head by suggesting that the entire CALEA burden for post-1994 capabilities must be borne by** ***carriers.***

To its credit, the Commission, at least to date, has looked at the language of 109(b)

and recognized that the statute does contemplate reimbursement for post-1994 capabilities and that such reimbursement involves a detailed inquiry into the burdensomeness and difficulty of achieving the capability. Less admirably, the Commission has declined to ever actually tackle this task head-on. It has, rather, deferred any action on 109 petitions and has provided no guidance as to how such petitions will be reviewed.

This failure to act places carriers in an untenable position: they have a present obligation to install the capability (absent an extension), but they do not know definitively whether the installation will be deemed reasonably achievable. They cannot go ahead and install the capability in the interim in the expectation of reimbursement later because the government has the option, in the event of a "not reasonably achievable determination", of deciding under 109(b)(2) *not* to pay for the particular capability if it determines that it is not worth the expenditure. Given the FBI's public pronouncements about the unavailability of funds to reimburse carriers, Law Enforcement would almost certainly exercise that option. But by that point the capability would probably have already been installed. This state of perpetual limbo is unfair to carriers and does nothing to further the actual implementation of CALEA capabilities.

It is therefore critical that the Commission develop a method for quickly and fairly determining whether a CALEA capability is reasonably achievable. While such determinations are being made – and the statute requires that they be made relatively swiftly – carriers should be afforded an automatic extension of the obligation to install. Finally, the Commission should issue firm guidelines as to what is reasonably achievable because the vast majority of situations will fall definitively on one side or the other of the line drawn, and carriers can proceed or not proceed on that basis. Only the rare gray areas will require Commission intervention.

The Commission's task in this regard could be simplified by identifying categories of situations which would presumptively qualify for "not reasonably achievable" treatment. One such category would be the situation outlined above where a particular system or subsystem such as a TDMA network is being phased out by the carrier as

obsolete. In those circumstances, several things are clear:

(1) The addition of the capability will not in any sense be a product of "the evolutionary introduction of new technology by telecommunications carriers in the normal course of business." On the contrary, the implementation of an upgrade under these circumstances would be highly *abnormal* and would not be based on the introduction of new technology. Moreover, the addition of this capability would not be "in the course of general network upgrades" as anticipated by the Commission.[2] Rather, if the capability were available at all, it would be outmoded or obsolete technology which will soon be abandoned and certainly does not constitute an improvement or upgrade.

(2) Because the capability bears no relation to any planned improvement in the underlying system, it is starkly clear that the entire expense is directly attributable to CALEA. The CALEA implementation scheme contemplates that CALEA capabilities will be incorporated into telephone networks as an integral part of the on-going evolution, advancement and replacement of existing technologies with new and improved ones. This phased, natural introduction reduces the obligation of the government to pay for CALEA-specific upgrades. In this case, however, the technology is wholly unrelated to any system upgrade and would never be installed but for the CALEA requirement. This seems, however, to place the obligation to pay for the capability very squarely on the government, an obligation which the government would probably just as well avoid.

(3) The utility of the capability is increasingly limited by the declining numbers of users. As noted, the TDMA systems are in the process of being phased out. All users of this technology will be off of it in a few years as they procure new handsets. The number of

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[2] *CALEA, Second Report and Order*, 15 FCC Rcd 7105, 7128 (2000).

customers using TDMA systems is already diminishing and will likely diminish even more as the years approach 2008. Less than half of Corr's subscriber base is presently TDMA, and the percentage is declining rapidly. Thus, not only will the sheer numbers of people who will be prospective intercept targets be quite small relative to the overall customer population, they will also tend to be the poor, the elderly and other infrequent cellular users who do not mind using an antiquated technology – not the most likely targets of law enforcement efforts.

(4) It is highly unlikely under these circumstances that the government would ever choose to expend public funds to reimburse a carrier for the installation of soon-to-be-discarded capabilities. If the government can get the capability for "free," *i.e.* at the carrier's sole expense, it will obviously take the freebie; if it had to proceed as businesses, people and even government agencies act in the regular world by making an assessment of the benefit versus the cost, it would obviously never incur the expense of relatively useless capability. Law Enforcement would most likely exercise its right to just let the system be phased out rather than paying for it. If the government would not be willing to pay for it, why should the carrier who gets no benefit from the capability whatsoever?

We recognize, of course, that these considerations do not track precisely the 11 "factors" cited by the statute at 109(b)(1), some of which have little relevance to the "reasonably achievable" determination for CMRS carriers. In any case, if the utility of installing a capability in an obsolete system were considered against those factors, in virtually every instance it would be clear that there would be both (a) little or no benefit to the public from the installation and (b) a negative consequence to the carriers. Unless the cost of installing the capability is trivial (in this context, under $1,000), the statute requires

a determination that such installations are not readily achievable. The Commission can save all concerned the expense and effort of seeking individualized determinations by declaring the installation of CALEA compliant hardware and software in this situation to be presumptively not readily achievable and therefore categorically exempt unless Law Enforcement bears the expense.

II. Reimbursement for Individual Intercepts.

In a previous *Report and Order*, the Commission declared that carriers could recover the capital costs of CALEA software and hardware by assessing a "per surveillance" fee which recovers both the capital costs and the costs of undertaking each specific electronic surveillance.[3] This pronouncement was perfectly consistent with the requirement of Title III of the Omnibus Crime Control statute providing that Law Enforcement must compensate carriers for their costs incurred in providing surveillance services and, of course, with the ordinary Fifth Amendment principle that persons may not be deprived of property without just compensation. Unfortunately, neither the Commission nor the courts have elaborated on how either the capital costs or the direct expenses of providing a specific surveillance were to be calculated. Moreover, Law Enforcement has frequently taken the position (as it has now done before the Commission) that it has no obligation to reimburse carriers for their capital costs, despite the FCC's declaration. In the NPRM, the Commission seems to have backed off its earlier pronouncement as having been made "without the benefit of a full and complete record." The upshot of all this is to leave carriers, law enforcement, and judges who must assess costs in connection with surveillance orders in a state of confusion. The Commission needs to clarify the situation quickly so that all stakeholders can proceed with a clear knowledge of who is paying and how the costs are assessed.

As a preliminary matter, the Commission should swiftly and clearly disabuse Law Enforcement of the idea that they are somehow entitled to free service from carriers. Quite apart from the Fifth Amendment which requires compensation for property (or, here,

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[3] *CALEA, Order on Remand*, 17 FCC Rcd 6896, 6917 (2002).

services) taken by the government, Congress expressly authorized carriers to recover the costs of intercepts from Law Enforcement. To the extent that capital costs of CALEA compliance can be directly assigned and segregated from ordinary network costs of the carrier, it is indisputable that these represent costs of intercept provisioning. Congress did not exclude such costs from its cost-recovery directive in Title III, and there is no reason why it should have. While Law Enforcement has a strong incentive to reduce its own budget by trying to get others to pick up its expenses, the Commission has no legal grounds whatsoever to override the Congressional pronouncement that costs are to be recovered by carriers – in full. The problem here is how to calculate those costs and see that they are paid.

A. Computing the Costs

One model to use here would be the method used by states such as Alabama to determine the costs of E911 compliance and reimburse carriers from the state fund. Alabama requires carriers seeking reimbursement for E-911 costs to identify the costs of compliance. The worksheet calls for the costs to be identified, itemized by category, be supported with documentation, and certified as true by the submitting carrier. This system has generally resulted in accurate cost assessments without much dispute, which has in turn permitted reasonably prompt disbursement of funds to reimburse carriers for their costs. There is no reason why similar format and process could not be followed here. We would exclude from the reimbursable costs any costs incurred as part of a more general network upgrade. As contemplated by the statute, the only costs eligible for repayment would be those directly and specifically caused by the CALEA obligation.

B. Reimbursing the Costs

Two alternative models are available here. Option I is the pay-as-you-go method used erratically to date. Under this method, Law Enforcement would simply pay each carrier for a surveillance cost each time it undertook one. The capital costs – the same ones identified above --would be amortized over the life of the equipment and charged to Law Enforcement based on the average number of surveillances performed each year by that carrier. This would result in Law Enforcement paying each carrier the full costs of CALEA compliance and specific surveillances as the surveillances are undertaken over time. This has the virtue of assigning the payment obligation to the cost-causative agent and requiring payment in close to real time. The problem is that in many cases, especially in rural areas, surveillances are few and far between. Law Enforcement might end up paying hundreds of thousands of dollars for a single wiretap in Kalamazoo, and for that reason might opt to forgo the wiretap. On the other hand, we should not feel too sympathetic for Law Enforcement because the hapless carrier in Kalamazoo would have already paid those same hundreds of thousands of dollars to install CALEA equipment which might be used little or never at all.

This is why, on balance, Corr feels that the CALEA burden should most properly be spread over the entire population and paid for by the entire population. Making America's communications system readily accessible for Law Enforcement surveillance is something the American people as a whole presumably endorse as a public good, one which outweighs the invasion of privacy entailed by the process. It is the entire populace that benefits from the capture of criminals or terrorists, not the subscribers to the communications services themselves. Unlike most of the other "social services" provided by telecom carriers (E-911, TRS, universal service, etc.), CALEA does not benefit

subscribers directly. In a way, subscribers who are the subjects of surveillance are the ones least likely to benefit by the feature; given the choice, they would probably just as soon not to be paying for or enjoying that network "feature." Since it is the general public that benefits from the program rather than phone users, it makes most sense for the program to be supported out of general tax revenues in the same way that all other law enforcement activities are supported. We do not make car manufacturers, for example, pay to support the procurement of police vehicles; we correctly impose that burden on the body politic. There is absolutely no reason why this burden should be treated any differently. CALEA is most properly denominated as a "homeland security" project, one which enhances the ability of Law Enforcement to prevent terrorism and catch other perpetrators. The expense of outfitting carriers for electronic surveillance is therefore one that should properly be included in the homeland security budget. This would give it the right priority in the federal budget and accurately identify it as a national expense. Absent that, Option I most precisely places the payment burden on the cost-causative agent. The option of making carriers (and, hence, their customers) bear the burden of procuring and installing a national wiretap infrastructure to support the needs of Law Enforcement without being compensated is no alternative at all. It is not only unfair, but violates the express directives of Title III, the intent of CALEA, and the Fifth Amendment.

Respectfully submitted,

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